RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02 (F)-31 OF 2008(W)
ZAKI AZMI CHIEF JUSTICE, RICHARD MALANJUM CJ (SABAH AND SARAWAK) AND JAMES FOONG FCJ
13 NOVEMBER 2009

Civil Procedure — Jurisdiction — Court of Appeal — Whether breach of agreement pleaded — Whether Court of Appeal should give decision in strict compliance with pleadings — Whether court could create cause of action or defence to do justice

Contract — Breach — Whether appellant bank breached agreement to provide overdraft facilities to respondent and prevented completion of project — Appointment of independent accountants by appellant to monitor respondent's project — Whether parties mutually agreed to appointment — Whether accountants appointed as agents of appellant — Whether appointment of accountants as co-signatories to cheques would result in appellant being in fiduciary relationship with respondent

Kwan Chew Holdings Sdn Bhd, the respondent housing developer, was the registered owner of a piece of property situated in Kuala Pilah, Negeri Sembilan ('the land'), which was subdivided into 40 lots with 40 titles. The respondent intended to construct houses on this land and have it converted into a housing estate known as Taman Dangi ('the project'). On 28 December 1983, the appellant bank granted the respondent an overdraft facility of RM250,000 with the repayment to be within two years from the time of drawdown. This facility was secured by a first legal charge over the 40 titles to the land. On 14 April 1984, the respondent was granted a further overdraft of RM150,000 on the same terms of repayment as the first overdraft, with a second legal charge of the same 40 titles as security for this loan. Thereafter the respondent requested for a temporary overdraft facility of RM150,000 from the appellant bank to pay for certain construction works in Taman Dangi. It was a term of this temporary facility that any drawdown must be against presentation by the respondent of an architect's certificate for completion of the works carried out in Taman Dangi for which the loan was intended. By 31 December 1984, a sum of RM120,000 was released from this temporary facility. The total loan given to the respondent as at 5 February

1985 was therefore RM520,000 and the respondent had overdrawn RM24,587.86 against the total loan. When the respondent's financial position worsened, the appellant informed the respondent that its entire rescheduled loan was to be repaid within a year or by way of redemption of the 40 titles charged to the appellant fixed at the rate of RM30,000 per title. At the same time the appellant also offered to the respondent an end finance facility of up to RM1m for purchasers of the houses in Taman Dangi. It was a term of the end-financing agreement that the respondent had to acknowledge that each of the purchaser-borrowers had paid the difference between the housing loan amount and the purchase price ('the non-financed portion of the housing loan'). This requirement was imposed by the appellant because at that time there was suspicion that the respondent was diverting funds from the Taman Dangi project to other projects undertaken by the respondent's related companies. To allay its fears that the respondent was diverting funds from the project, the appellant insisted that it would only continue its relationship with the respondent if a firm of independent accountants ('the accountants') was appointed to monitor the Taman Dangi project. The parties also agreed that any cheques issued by the respondent had to be co-signed by the accountants. However, despite this the appellant refused to honour two cheques issued by the respondent even though they were co-signed by the accountants. Due to financial problems the Taman Dangi project came to a halt and the respondent approached the appellant for further funds to revive the project. The appellant agreed to provide a fresh loan of RM45,000 subject to certain conditions but this arrangement collapsed with the appellant releasing only a sum of RM2,000. The project was finally completed under a government assisted scheme and the respondent commenced an action against the appellant for breach of contract. The respondent alleged that the appellant's failure to release the sum of RM150,000 under the temporary overdraft facility; its refusal or delay in releasing the end-financing; the bank's wrongful appointment of the accountants to control the respondent's operations in the project; its failure to honour the two cheques although co-signed by the accountants; and failure to release the full RM45,000 of the fresh loan to revive the project, constituted grounds for breach of contract. When the High Court dismissed the suit the respondent appealed to the Court of Appeal. The Court of Appeal agreed with the High Court and found that the real issue in the case was whether the appellant had acted in breach of contract, but it held that the High Court had taken an over-simplistic approach to the case in several respects when ruling in the defendant's favour. According to the Court of Appeal the accountants were an agent of the appellant and in such a role implicated the appellant as the principal holding a fiduciary position to the respondent in the project. When the Court of Appeal reversed the decision of the High Court, the appellant obtained leave to proceed with the instant appeal.

Held, allowing the appeal with costs here and below:

(1) The appellant had not breached the terms of the contract when it failed to release the sum of RM150,000 under the temporary overdraft facility as it was a term of this temporary facility that any drawdown in this respect must be against presentation by the respondent of an architect's certificate for completion of the works carried out in Taman Dangi. The respondent's failure to produce such a document was not the fault of the appellant and there was no justification for the Court of Appeal to overrule the trial judge on this point (see paras 25–26).

(2) The terms of the end finance agreement specified that the respondent had to certify that each of the purchaser-borrowers had paid the non-financed portion of the housing loan to prevent the respondent from using the monies for projects by other related companies. As such, if the approach of the Court of Appeal to interpret facts based on substance and not mere form were adopted it would reveal that the appellant had not committed any breach in releasing the end-financing. Thus the Court of Appeal had erred in the interpretation of the facts when reversing the trial judge's findings (see para 28).

(3) In respect of the wrongful appointment of the accountants to control the respondent's operations in the project, the issue for determination was the finding of fact as to whether the parties had mutually agreed to the appointment of the accountants. The Court of Appeal's finding that the appellant stood in a fiduciary position to the respondent as the latter's joint venturer was too far fetched and beyond the bounds permitted by law. In fact the Court of Appeal's proposition was not even pleaded by the respondent. It is trite that a party is bound by its pleadings and it is not the duty of the court to create or invent a cause of action or defence under the guise of doing justice. Further the oral and documentary evidence adduced in the case did not show that the accountants were appointed as an agent of the appellant. They were appointed to assist the respondent to strictly apply its funds for the project and not divert them elsewhere (see paras 31–37).

(4) Although the appellant had imposed the condition that the cheques had to be co-signed by the accountants and then failed to subsequently honour two such cheques, these cheques could only be cleared if there were available funds. Since there wasn't the appellant was not obliged to honour them (see para 41).

(5) The appellant failed to release the full RM45,000 of the fresh loan to revive the project because the respondent did not comply with certain conditions set out in its offer for this facility. As such there is no merit in this ground (see paras 44–45).

[Bahasa Malaysia summary

Kwan Chew Holdings Sdn Bhd, responden, merupakan pemilik berdaftar hartanah yang terletak di Kuala Pilah, Negeri Sembilan ('tanah tersebut'), yang telah dipecah bahagikan kepada 40 lot di bawah 40 hak milik. Responden berniat untuk membina rumah di atas tanah ini dan menukarkannya kepada kawasan perumahan yang dikenali sebagai Taman Dangi ('projek tersebut'). Pada 28 Disember 1983, perayu memberikan responden satu kemudahan overdraf sebanyak RM250,000 dengan pembayaran semula dalam masa dua tahun dari tarikh penggunaan pinjaman tersebut. Kemudahan ini dijamin oleh gadaian sah pertama ke atas 40 hak milik tanah tersebut. Pada 14 April 1984, responden diberikan tambahan overdraf sebanyak RM150,000 dengan terma-terma pembayaran yang sama dengan overdraf pertama, dengan gadaian sah kedua ke atas 40 hak milik yang sama sebagai jaminan bagi pinjaman ini. Kemudiannya responden memohon untuk kemudahan overdraf sementara sebanyak RM150,000 daripada perayu untuk membayar kerja-kerja pembinaan tertentu bagi Taman Dangi. Terma bagi kemudahan sementara ini adalah sebarang penggunaan pinjaman ini harus dibuat berdasarkan penyerahan sijil arkitek oleh responden bagi kerja-kerja yang telah sempurna di Taman Dangi yang mana merupakan tujuan pinjaman tersebut. Pada 31 Disember 1984, sejumlah RM120,000 telah dikeluarkan bagi kemudahan sementara ini. Jumlah pinjaman yang telah diberikan kepada responden setakat 5 Februari 1985 adalah sejumlah RM520,000 dan responden telah terlebih guna sebanyak RM24,587.86 daripada jumlah penuh pinjaman tersebut. Apabila kedudukan kewangan responden semakin merosot, perayu memaklumkan responden bahawa pinjaman yang telah dijadual semula itu harus dibayar dalam masa satu tahun atau dengan cara penebusan 40 hak milik yang telah digadaikan kepada perayu pada kadar tetap RM30,000 satu hak milik. Pada masa yang sama perayu juga menawarkan kepada responden kemudahan pembiayaan akhir sehingga RM1 juta bagi pembelian rumah-rumah di Taman Dangi. Adalah menjadi terma-terma perjanjian pembiayaan akhir tersebut bahawa responden harus mengiktiraf bahawa setiap pembeli-peminjam telah membayar perbezaan antara jumlah pinjaman perumahan tersebut dan harga belian ('jumlah yang tidak dibiayai dalam pinjaman perumahan tersebut'). Keperluan ini dikenakan oleh perayu disebabkan pada masa itu, timbulnya kesangsian bahawa responden menyalurkan wang daripada projek Taman Dangi ke projek-projek lain yang dijalankan oleh syarikat-syarikat yang berhubung kait dengan responden. Untuk mengurangkan kebimbangannya bahawa responden memindahkan wang daripada projek tersebut, perayu mendesak bahawa ia hanya akan meneruskan urusan dengan responden jika satu firma perakaunan bebas ('akauntan-akauntan') dilantik untuk mengawasi projek Taman Dangi. Pihak-pihak juga bersetuju bahawa sebarang cek yang dikeluarkan oleh

responden perlu ditandatangani bersama dengan akauntan-akauntan tersebut. Walau bagaimanapun, perayu tidak mahu melunaskan dua cek yang dikeluarkan oleh responden walaupun cek-cek tersebut ditandatangani bersama akauntan-akauntan tersebut. Akibat daripada masalah kewangan projek Taman Dangi tergendala dan responden meminta kepada perayu untuk pinjaman bagi memulihkan projek tersebut. Perayu bersetuju memberi pinjaman yang baru sebanyak RM45,000, tertakluk kepada beberapa syarat tetapi persetujuan ini gagal apabila perayu memberi sebanyak RM2,000 sahaja. Projek tersebut akhirnya sempurna dengan skim bantuan kerajaan dan responden memulakan tindakan terhadap perayu untuk pelanggaran kontrak. Responden mendakwa bahawa kegagalan perayu mengeluarkan sejumlah RM150,000 di bawah kemudahan overdraf sementara; keengganan atau kelewatan mengeluarkan pembiayaan akhir; pelantikan salah oleh pihak bank akan akauntan-akauntan untuk mengawal operasi projek responden; kegagalannya melunaskan dua cek walaupun telah ditandangani bersama akauntan-akauntan tersebut; dan kegagalan mengeluarkan jumlah penuh RM45,000 sebagai pinjaman baru untuk memulihkan projek tersebut, yang mana merupakan pelanggaran kontrak. Apabila Mahkamah Tinggi menolak tindakan itu, responden merayu ke Mahkamah Rayuan. Mahkamah Rayuan bersetuju dengan Mahkamah Tinggi dan memutuskan bahawa isu sebenar dalam kes ini ialah sama ada perayu telah memungkiri kontrak, tetapi mahkamah tersebut memutuskan bahawa Mahkamah Tinggi telah mengambil pendekatan yang terlalu mudah ke atas kes ini dalam beberapa perkara apabila memutuskan memihak kepada defendan. Menurut Mahkamah Rayuan, akauntan-akauntan tersebut merupakan ejen perayu dan dalam peranan sebegitu telah membabitkan perayu, sebagai prinsipal, dalam kedudukan fidusiari kepada responden dalam projek tersebut. Apabila Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi, perayu telah mendapat keizinan untuk meneruskan rayuan ini.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Rayuan:

(1) Perayu tidak memungkiri terma-terma kontrak tersebut apabila ia gagal mengeluarkan sejumlah RM150,000 di bawah kemudahan overdraf sementara kerana adalah merupakan terma dalam kemudahan sementara itu bahawa sebarang penggunaan pinjaman tersebut mestilah dibuat dengan penyerahan sijil arkitek oleh responden bagi kerja-kerja yang telah siap di Taman Dangi. Kegagalan responden menyerahkan dokumen itu bukanlah salah perayu dan oleh itu tiada justifikasi bagi Mahkamah Rayuan menolak hakim bicara dalam hal ini (lihat perenggan 25–26).

(2) Terma-terma perjanjian pembiayaan akhir mengkhususkan bahawa responden harus mengesahkan bahawa setiap pembeli-peminjam telah membayar jumlah yang tidak dibiayai dalam pinjaman perumahan tersebut bagi mengelakkan responden menggunakan wang tersebut untuk projek-projek lain bagi syarikat-syarikat yang berkaitan. Oleh itu, jika pendekatan Mahkamah Rayuan untuk mentafsirkan fakta-fakta berdasarkan isi dan bukannya kaedah prosedur semata-mata, maka ia akan menunjukkan bahawa perayu tidak melakukan sebarang pelanggaran dalam mengeluarkan pembiayaan akhir tersebut. Maka, Mahkamah Rayuan telah khilaf dalam mentafsirkan fakta-fakta apabila mengakas keputusan-keputusan hakim bicara (lihat perenggan 28).

(3) Berikutan dengan pelantikan salah akauntan-akauntan untuk mengawal operasi projek responden, isu yang perlu dipertimbangkan ialah penemuan fakta iaitu sama ada pihak-pihak telah bersetuju atas pelantikan akauntan-akauntan tersebut. Keputusan Mahkamah Rayuan bahawa perayu berada dalam kedudukan fidusiari kepada responden kerana usahasama responden sukar diterima akal dan melampaui batasan yang dibenarkan undang-undang. Malah, saranan Mahkamah Rayuan tersebut tidak langsung diplidkan oleh responden. Adalah sudah tetap bahawa sesuatu pihak terikat dengan plidingnya dan bukanlah tugas mahkamah untuk mencipta atau mereka satu kausa tindakan atau pembelaan dengan bertopengkan keadilan. Lagi pula, keterangan lisan dan dokumentar yang dikemukakan dalam kes ini tidak menunjukkan bahawa akauntan-akauntan tersebut dilantik sebagai ejen perayu. Mereka dilantik untuk membantu responden menggunakan wangnya hanya untuk projek tersebut dan bukannya memindahkan wangnya ke tempat lain (lihat perenggan 31–37).

(4) Walaupun perayu telah mengenakan syarat bahawa cek-cek harus ditandatangani bersama akauntan-akauntan tersebut dan kemudiannya gagal melunaskan dua cek itu, cek-cek tersebut hanya boleh dijelaskan sekiranya ada wang yang mencukupi. Oleh sebab wang tidak mencukupi, maka perayu tidak wajib melunaskannya (lihat perenggan 41).

(5) Perayu gagal mengeluarkan sepenuhnya jumlah RM45,000 pinjaman baru untuk memulihkan projek tersebut kerana responden tidak mematuhi beberapa syarat yang dinyatakan dalam tawarannya bagi kemudahan ini. Oleh itu, tiada merit untuk alasan ini (lihat perenggan 44–45).]

Notes

For cases on breach in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2516–2749.

For cases on Court of Appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4381–4383.

Cases referred to

Amanah Butler (M) Sdn Bhd v Yike Chee Wah [1997] 1 MLJ 750; [1997] 2 CLJ 79, CA (refd)

Doyle v Olby (Ironmongers) Ltd & Ors [1969] 2 QB 158, CA (refd)

Lim Chee Holdings Sdn Bhd v RHB Bank Bhd (formerly known as Kwong Yik Bank Bhd) [2005] 6 MLJ 497, CA (refd)

Menah Sulong v Lim Soo & Anor [1983] 1 CLJ 26, FC (refd)

Midland Bank Ltd v Conway Borough Council [1965] 2 All ER 972, QBD (refd)

Oversea-Chinese Banking Corp Ltd v Infocommcentre Pte Ltd [2005] SGHC 134 [2005] 4 SLR 30, HC (refd)

Venkatarama Aiyar J Shanti Prasad Jain v Director of Enforcement AIR 1962 SC 1764 (refd)

Appeal from: Civil Appeal No W-02–427 of 2000 (Court of Appeal, Putrajaya)

Wong Chong Wah (Lim Koon Huan with him) (Skrine) for the appellant.
Ramdas Tikamdas (Siva Ram & Associates) for the respondent.

James Foong FCJ (delivering judgment of the court):

INTRODUCTION

[1] In this instant appeal, the respondent, a housing developer, has sued its banker, the appellant, for breach of contract. This suit was dismissed by the High Court. On appeal, the Court of Appeal (by majority) overturned the decision of the High Court and ordered damages to be assessed. Dissatisfied, the appellant sought leave from this court to refer two questions of law (which we shall disclose in due course) to this court. Leave was granted.

[2] As this appeal is substantially fact sensitive, we shall begin by setting out the chronology of the events that transpired between the parties.

[3] The respondent was the registered owner of a piece of property in Kuala Pilah, Negeri Sembilan. This said property was subdivided into 40 lots with individual document of title issued to each of them. Though there were 40 lots, only 36 houses were to be built in this housing estate to be known as Taman Dangi.

A [4] Initially on 28 December 1983, the respondent was granted an overdraft facility of RM250,000 by the appellant. This facility was secured by a first legal charge over the 40 titles to the said property. The repayment of this loan was to be within two years from the time of drawdown. On 14 April 1984, the respondent was granted a further overdraft of RM150,000. The B repayment of this was again to be two years from date of drawdown. As security of this loan, a second legal charge was created over the same 40 titles of the said property. The total loan given to the respondent as at 14 April 1984 was therefore RM400,000.

C [5] At the request of the respondent for a temporary loan to pay for the construction of certain works and drainage in Taman Dangi, the appellant on 27 August 1984 granted a temporary overdraft facility of RM150,000 to the respondent. This temporary overdraft was only for a short period of approximately four months and had to be repaid by 31 December 1984. It D was a term and condition of this temporary facility that any drawdown must be against presentation by the respondent of an architect's certificate for completion of the works carried out in Taman Dangi for which this loan was intended. By 31 December 1984, only a sum of RM120,000 was released.

E [6] As at 5 February 1985, the respondent's account stood at minus RM544,587.86. This means the respondent had overdrawn by RM24,587.86 against the total loan of RM520,000 given by the appellant.

F [7] By November 1985, the respondent's financial position worsened with declining sales and diversion of funds from Taman Dangi to other projects elsewhere undertaken by the respondent's associated companies. By this time, the respondent's account stood at RM618,421.17 against an approved limit of only RM400,000 (the temporary overdraft of RM150,000 with only G RM120,000 drawndown not taken into consideration for reason that this facility had expired).

[8] To regularise and reschedule the loans granted to the respondent, the appellant on 23 September 1986, informed the respondent that its overdraft H facilities stood at RM520,000 being the total original overdraft of RM400,000 and RM120,000 drawndown from the temporary facility. It was agreed that mthis entire rescheduled loan was to be repaid within a year or by way of redemption of the 40 titles charged to the appellant fixed at the rate of RM30,000 per title.

I [9] By the same instrument regularising the above loan, the appellant also offered to the respondent an end-finance facility of up to RM1m for purchasers of the houses in Taman Dangi but the agreement for this end-financing was only executed on 30 March 1987.

[10] As at 21 August 1987, there were only nine purchasers who had sought end-financing from the appellant but their loans were not released into the accounts of the respondent. This was one of the grounds for the alleged breach by the appellant. A

[11] The explanation given by the appellant was that it was due to the failure of the respondent to confirm that each of these nine end-financing purchasers had paid to the respondent the difference between the loan amount and the purchase price ie the non-financed portion. This requirement was imposed due to the suspicion that the respondent had used such funds for other projects undertaken by its related companies. If these funds were to be directed exclusively to Taman Dangi, the project would be completed and the loans repaid to the appellant. We will be touching on this issue later but for the moment, as at 5 November 1987, the sum collected by the respondent for this non-financed portion was RM419.172, received not only from the nine end-financing purchasers but from all the 23 buyers of the houses sold at that time. As this matter was not resolved, the appellant had reservation as to whether the respondent was sincere in completing Taman Dangi in order to settle its debts. B C D

[12] For this, the appellant insisted that it would only continue its relationship with the respondent if a firm of independent accountants was appointed to monitor the Taman Dangi project. Reluctantly, the respondent agreed and on 13 September 1987, Ms Hanafiah, Raslan and Monamad ('RHM') were appointed independent accountants with the following scope of work: E F

(a) monitor the progress of the development of Taman Dangi;

(b) to control the total sale proceeds and payment of creditors; and

(c) to furnish us (the appellant) with information relating to the above as and when requested. G

[13] By this time, the Taman Dangi was 95% completed.

H

[14] RHM proceeded with their task and came up with an opinion that in order to complete the said project an additional sum of RM101,200 was required. Further, the parties agreed that any cheques issued by the respondent had to be co-signed by RHM. However, despite this, the appellant refused to honour two such cheques co-signed by HRM. This became another ground for the alleged breach of contract. I

[15] Primarily due to financial problems encountered by the respondent, the Taman Dangi project came to a halt. But some 1 1/2 years later, the

respondent approached the appellant for further funds to revive the project. The appellant agreed to provide a RM45,000 fresh loan for this purpose but subject to a number of conditions set out in the appellant's letter of offer dated 17 July 1989. Unfortunately this arrangement also collapsed with the appellant releasing only a sum of RM2,000 to the respondent. This again constituted another ground for breach.

[16] Eventually, the Taman Dangi was completed under a government assisted scheme known as the 'Tabung Projek Perumahan Tebengkalai' but this did not deter the respondent from seeking redress against the appellant by filing this action.

THE RESPONDENT'S CLAIM

[17] We now move on to the pleaded case of the respondent. The respondent's cause of action against the appellant is solely for breach of contract and the grounds supporting are summarised as follows:

That the appellant:

(a) had failed to release the full sum of RM150,000 under the temporary overdraft facility;

(b) had refused or delayed in releasing the end-financing to nine approved end-financing purchasers thereby depriving the respondent from using 15% of these funds (the portion agreed between the parties) to pay creditors for this project;

(c) had wrongfully appointed HRM as the independent accountant and receiver and manager to control the respondent's operation in the Taman Dangi project;

(d) had failed to honour cheques co-signed by HRM; and

(e) had failed to release the full subsequent loan of RM45,000 necessary to revive the said project.

FINDING OF THE HIGH COURT

[18] On each of the complaints advanced by the respondent except for the last, the learned trial judge made a ruling.

[19] Relating to the appellant's failure to release the entire temporary loan of RM150,000, the trial judge was of the view that the respondent had only produced architect's certificates for work done up to RM120,000. As it was

an agreed term for this loan that any release must be supported by an architect's certificate, the failure of the respondent to justify payment of the remaining RM30,000 with such document cannot be attributed to the appellant.

[20] On the appellant's refusal or delay in releasing the end-finance to the nine approved purchaser borrowers, the trial judge found that since cl 5.02(e) of the end-financing agreement requires the respondent to acknowledge that each of these purchaser-borrowers had paid the non-financed portion, failure on the part of the respondent to do so justified the appellant for not releasing the end finance. Further, 'failure on the part of the purchasers to pay the difference can result in contractual disputes between the Plaintiff developer and the purchasers which could jeopardise the repayment of the loan. This condition was a condition precedent for the disbursement of the loan by the bank'.

[21] On the appointment of HRM as the independent accountant, the trial judge came to a conclusion that there is no truth in the respondent's allegation that HRM was appointed unilaterally as 'receiver and manager'. The trial judge elaborated by saying:

> HRM were never appointed receiver and managers but independent accountants to perform these functions (as set out in their letter of appointment)... The suggestion by the plaintiff that HRM were unilaterally appointed is also wrong. By end September 1987, the plaintiff's facilities had not only expired but the extension for repayment granted by the defendant's letter of 23 September 1986 had also expired. The plaintiff then sought the defendant's help to resolve its financial predicament over its lack of finance to complete its various projects as is evidence by its letter of 21 August 1987. The defendant finally agreed to the repayment of the outstanding amounts without recourse to legal proceedings conditional amongst other things, on the appointment of HRM as independent consultants. This offer including the appointment of HRM was accepted by the plaintiff by its acknowledgment of the defendant's letter. The defendant even furnished the defendant with a board resolution to implement the restructuring scheme.

[22] Regarding the failure of the appellant to honour the two cheques co-signed by HRM, we can only find this in the trial judge's judgment:

> HRM did not control the bank account of the plaintiff in any way. Though HRM were co-signatories to the cheques issued by the plaintiff, this was in respect of three cheques for particular creditors which bank was prepared to advance to help complete the project ... HRM after undertaking the cash flow projections recommended payment of certain monies which was to coincide with their cessation as independent consultants. The defendant duly complied by writing a letter in regard to the release of monies totaling RM23,956.

[23] On the allegation that the appellant had failed to release the full sum of RM45,000 in order to revive the Taman Dangi project, the trial judge made no ruling on this.

COURT OF APPEAL

[24] The Court of Appeal commenced by criticising the High Court for taking 'an over simplistic approach to the case in several important respects when ruling in the defendant's favour' though agreeing from the very beginning that 'the real issue before the High Court was whether the defendant had acted in breach of contract'. The Court of Appeal was of the view that the High Court was obliged to 'interpret the facts and to determine the true nature of the bargain in substance and not mere form'. Then it proceeded to deal with each of the alleged breaches. We have classified them below for analysis.

Failure to fully release the entire overdraft of RM150,000

[25] On the first ground that the appellant only released RM120,000 instead of the full temporary facility of RM150,000, the Court of Appeal though conceding that 'the plaintiff only produced architect's certificate for up to RM120,000' to support such payment went on, without any relevance, to two clauses in the loan agreement for this facility which says that interest should not be considered for disbursement of the loan.

[26] This, in our view, has nothing to do with whether the appellant had breached the terms of the contract by failing to release the full amount agreed upon when this temporary facility could only be drawn against an architect's certificate for works completed in Taman Dangi and failure to produce such document was not the fault of the appellant. For this, there is no justification for the Court of Appeal to overrule the trial judge on this point.

Refusal to release end finance

[27] On the issue of the appellant's refusal or delay in releasing end-finance to nine purchaser borrowers, the Court of Appeal found:

> The oral and documentary evidence in the record of appeal shows that the defendant as at the date of its letter of 5 November 1987 was fully aware of the fact that the plaintiff had collected a sum of RM419,172 from end purchasers. This is what is referred to in correspondence in the case as 'the unfinanced portion' of the purchase price. Yet, as late as 16 August 1988, the defendant wrote to the plaintiff stating that 'the housing loans approved by some buyers of your houses in Dangi project, Kuala Pilah had not been released for the reason that you have failed to

confirm the unfinanced portion of the various selling prices have been fully settled'. That assertion is, of course, incompatible with other evidence led at the trial.

[28] Though the respondent may have indicated to the appellant that all the purchasers had paid the non-financed portion, the fact remains (as the trial judge has found) that this was inadequate for the purpose of complying with the requirements as set out in the end finance agreement. The terms of that agreement specify that the respondent has to certify individually to each of these purchaser borrowers. The reason for such a hard line approach can be detected from the admission by the respondent's managing director, 'PW1' who confessed that the respondent had collected the non-financed portion amounting to RM419,172 and used some of this for projects by 'other related companies'. These so called 'related companies' had some shareholders who were common with those in the respondent and were all involved in housing developments in other locations. At that material time, they were facing severe financial problems. So, instead of applying all monies received from sales in Taman Dangi for the exclusive use of the project and at the same time repay the appellant for the outstanding loans, the respondent was helping others despite being fully aware that 'it's (respondent's) only obliged to pay its own debts but not those related companies'. If one were to adopt the approach suggested by the Court of Appeal to interpret 'facts and to determine the true nature of the bargain in substance and not mere form' then this deception, in substance, must be taken against the respondent rather than the appellant. For this alleged breach, we are of the view that the Court of Appeal has erred in the interpretation of the facts when reversing the trial judge's finding.

Wrongful appointment of HRM

[29] On the respondent's claim that HRM was wrongly appointed as the independent accountant, the Court of Appeal accepted the finding of the trial judge that there is no basis for this claim since it was done with the consent of the respondent and approved by the respondent's board of directors. However, while elaborating on the role of HRM in the project, the Court of Appeal declared that HRM was an agent of the appellant and in such a role implicated the appellant as the principal holding 'a fiduciary position to the plaintiff (respondent) as the latter's joint venturer' in the Taman Dangi project.

[30] The approach by the Court of Appeal in coming to this conclusion is found in the following passages of the Court of Appeal's judgment:

A There are three points I would make about the appointment of the independent accountant. First, there is no agreement between the plaintiff and the defendant that the independent accountant was to be the plaintiff's agent. It must therefore follow in accordance with the general principles of agency that the independent accountant was the defendant's agent ...

B Now apply that to the facts here. It was the defendant who appointed — or to adopt the words of Lord Cranworth, placed — the independent accountant. Absent an agreement to the contrary — and there is no agreement here — the independent accountant was the defendant's agent. It follows that the defendant, acting by its agent, was in truth and fact participating with the plaintiff in the C running so much of the latter's business as concerned the Taman Dangi project. And that brings me to the second point I would make.

This is a case in which the relationship between the parties began as a banker and customer simpliciter. It was purely a contractual relationship. The defendant was lender and creditor and the plaintiff borrower and debtor. However in mid-stream, D this relationship of debtor and creditor appears to have had superimposed on it another special relationship. That this may happen has been recognised by high authority ...

Now for the third point I wish to make. It is this. In the peculiar circumstances of this case, the special relationship is fiduciary in nature. In other words, upon the E defendant appointing the independent accountant as compulsory signatory of all the plaintiff's cheques, the defendant stood in a fiduciary position to the plaintiff as the latter's join venturer.

F **[31]** This proposition of the Court of Appeal gave rise to one of the two questions posed to this court when leave to appeal was allowed:

Whether it is opened to the Court of Appeal, in a case where the issue does not arise on the pleading or at all, to hold that an independent accountant, being a professional accountant and whose appointment over a borrower was procured by G a financier for certain specified and limited purposes is the agent of the financier and, where the borrower is a developer, the appointment of the independent accountant would constitute the financier the joint venture partner of the developer regardless of the scope and/or period of the appointment of the independent accountant?

H

[32] We regret to say that this proposition is too far fetched and has gone beyond the bounds permitted by law. First, this was not even an issue. The question for determination by the court was whether the appellant had breached the agreement by wrongly appointing HRM as the independent I consultant. This requires a finding of fact as to whether the parties had mutually agreed to the appointment. As disclosed, the trial judge had made such a finding in favour of the appellant and the Court of Appeal had accepted this. The matter should have rested there since the issue had been decided.

[33] Second, the proposition of the Court of Appeal was not even pleaded by the respondent. The respondent's cause of action against the appellant was for breach of contract. Nowhere in the respondent's pleading, expressly or by implication, can we detect a claim for breach of a joint venture agreement arising out of a fiduciary duty placed upon the appellant in the capacity as principal of an agent. It is a cardinal rule in civil litigation that the parties must abide by their pleadings. This is trite as can be seen from the decision of this court in *Menah Sulong v Lim Soo & Anor* [1983] 1 CLJ 26 where Ong Hock Thye CJ said:

> I think it is necessary in this case to emphasise once again that the courts should give their decision in strict compliance with the pleadings. As Lord Radcliffe said in *Esso Petroleum Co Ltd & Anor v Southport Corporation* [1956] 2 WLR 81 at p 91:
>
> > If an appellate court is to treat reliance as pedantry or mere formalism I do not see what part they play in our trial system.

[34] In fact, the Court of Appeal itself has reiterated this in *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750; [1997] 2 CLJ 79 where Gopal Sri Ram JCA (as he then was) said:

> It is trite law that a party is bound by its pleadings.

[35] On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[36] Third, from the oral and documentary evidence adduced in this case we are not convinced by the rationale adopted by the Court of Appeal in coming to the conclusion that HRM was the agent of the appellant and the appellant had thereby vicariously become liable to the respondent for breaching a fiduciary duty owed to the respondent in a joint venture agreement for the Taman Dangi project.

[37] In our opinion, just because HRM was appointed an independent accountant to oversee the affairs of the respondent and co-signed some of the respondent's cheques, it did not automatically make them an agent of the appellant. One must examine their scope of work and the events leading to their appointment. As disclosed earlier, HRM was appointed due to the

appellant's suspicion that the respondent was insincere to them. In order to give the respondent another chance to complete the project, HRM's scope of work was designed. These were mainly to assist the respondent apply its funds strictly for the Taman Dangi project and not to divert them elsewhere. To further regulate this, HRM were to co-sign some of the respondent's cheques. Such procedures were adopted to provide comfort to the appellant as well as to restrain them from instituting legal proceedings against the respondent to recover their loans. Further, perhaps, also as an inducement to grant further financial assistance to the respondent if things proceeded smoothly. In our opinion, these actions of the appellant were insufficient to superimpose the appellant's role as a banker simpliciter and that of the respondent as a customer both into partners in a joint venture scheme. For this to occur 'would have had to be such that it was more consistent with such a super-added relationship than with the ordinary relationship of banker and customer' — Sachs J in *Midland Bank Ltd v Conway Borough Council* [1965] 2 All ER 972 at p 978 or 'particular circumstances and requirements and the express terms of those relationship override the implied terms arising from the general relationship' as ruled by *Venkatarama Aiyar J Shanti Prasad Jain v Director of Enforcement* AIR 1962 SC 1764 (both cases cited by the Court of Appeal in support of its decision on this point). But in our opinion, based on the facts and reasons as disclosed this super-added relationship of the parties from that of an ordinary banker and a customer into one of a partnership in a joint venture scheme did not come about. In other words, the special relationship envisaged in the cases mentioned by the Court of Appeal was not attained given the facts and circumstances of this case.

[38] Further, we would like to add that HRM could not have been an agent of the appellant for the following reasons.

[39] First, the description of HRM as 'independent accountant' itself denotes that they were independent from both the appellant and the respondent. They were appointed as disclosed, out of a distrust by the appellant of the respondent yet a desire to see that the project is completed. So to give comfort to the appellant, the best alternative was for the appointment of an independent body to oversee certain aspect of the respondent's business in the Taman Dangi. These were set out in HRM's scope of work which was aimed at reducing the likelihood of the respondent repeating what it did before: diverting funds from here to elsewhere. Nowhere in HRM's job description can we find that they have become joint manager and operator with the respondent in the Taman Dangi project. The position of HRM was more like a 'professional middleman' as described by Richard Malanjum JCA (as he then was) in *Lim Chee Holdings Sdn Bhd v RHB Bank Bhd (formerly known as Kwong Yik Bank Bhd)* [2005] 6 MLJ 497 as follows:

On the assertion that the respondent should be answerable for the acts of HRM, again it is a question of fact whether HRM was the servant or agent of the respondent. There is no dispute that the appointment of HRM as an independent accountant was proposed by the respondent in its letter of 10 August 1987 to the appellant. But that alone should not make HRM the servant or agent of the respondent. More so in this case where the appellant agreed to the proposal. At best therefore HRM was a joint-appointee of the parties to act as their 'professional middleman' to help to resolved the problematic project. Hence we have no reason to interfere with the finding of the learned judge on this point.

[40] For reasons aforesaid, with respect, we cannot agree with the rationale of the Court of Appeal on this issue. There is no evidence to support the proposition except an imagination drawn from, if we may say, a desire to play the part of a crusader to fight a cause in which it does not know who the villain is. There is a limit to how far a court should do in the name of justice — see *Doyle v Olby (Ironmongers) Ltd & Ors* [1969] 2 QB 158.

Failure to honour cheques co-signed by HRM

[41] There can be no dispute that the appellant had refused to honour the two cheques co-signed by the respondent. But the simple reason to this is that there were no available funds in the respondent's account to honour them. The respondent's account at that material time was hopelessly overdrawn and the appellant had no obligation to facilitate more than what were previously agreed to. In short, HRM may be recognised as a required co-signatory of the respondent's cheques but these cheques could only be cleared if there were available funds. Since there wasn't the appellant was not obliged to honour them.

Failure to release the full sum of RM45,000 to revive the Taman Dangi project

[42] While attempting to revive the project in 1989 after it was stalled in 1987, the respondent had requested from the appellant an additional facility of RM45,000. This was allowed but with conditions attached. According to the respondent, the appellant only released a sum of RM2,000 and this constituted a breach of the agreement.

[43] The High Court, as we have stated earlier, made no finding on this. The Court of Appeal, except narrating that only a sum of RM2,000 was released out of a total facility of RM45,000 and the failure of the parties to agree to the scope of a power of attorney to be granted by the respondent to the appellant as security for this loan, also made no specific ruling on this matter. It is therefore incumbent upon this court to examine the evidence adduced in this case to come up with a decision.

[44] From our perusal of the evidence, we hold the view that the dispute over this matter was due to the reluctance of the appellant to release what was requested by the respondent unless they were strictly payments necessary for the completion of the Taman Dangi project up to the stage of a certificate of fitness for the houses built thereon. For this, the appellant demanded quotations on specific items to be spent. On the contrary, the respondent preferred a general disclosure on how this sum was to be expended in order to revive the project. They requested for an initial lump sum of RM20,000. Instead, the appellant only permitted a sum of RM2,000. The appellant's reason for this limit was the failure of the respondent to comply with the first condition set out in their letter of offer for this facility dated 17 July 1989 which reads:

> To furnish the Bank with a detail breakdown on cost for purchase of window louver, glass panes, labour cost and other touch up work that need to be done to ensure issuance of Certificate of Fitness from the relevant authorities (Please provide quotations).

[45] It is not in dispute that the respondent did not comply with this. If this is the case then the appellant was not be at fault for refusing to release the full amount. For this reason, we find no merit in this ground.

Second question posed to this court

[46] Before we conclude we would like to make a comment on the second question framed for this court:

> Whether it is open to the Court of Appeal to hold that the overdraft facilities for bridging finance granted by the appellant to the respondent for specific periods of time are in reality fixed loans?

[47] This arose from the Court of Appeal's remark in its judgment which says:

> Let me take bridging facility first. It is clear from the judgment appealed against that the learned judge accepted the submission of learned counsel for the defendant — a submission also advanced before this court — that there was here merely an overdraft and not a bridging loan. This appears to be premised on the fact that there is no document executed by the parties expressly creating a bridging loan facility by way of a fixed loan. With respect this is purely formalistic argument that ignores the realities of the case and to the substance. And it is against the weight of authority.

[48] We are of the view that the term 'fixed loan' referred to by the Court of Appeal here meant 'term loan'. We accept that there is a distinction

between a term loan and an overdraft. Generally speaking, an overdraft is like a revolving credit where the borrower can draw from it and repay back periodically with interest payable only on the amount drawn on the overdraft. A term loan however is usually for a fixed period that contemplates payment at or before the end of that period. But as for a bridging loan, according to the Singapore decision in *Oversea-Chinese Banking Corp Ltd v Infocommcentre Pte Ltd [2005] SGHC 134* [2005] 4 SLR 30, 'it is a hybrid creature bearing characteristic of both a term loan and overdraft facility. In such case, a bank has to exercise prudence in unequivocally spelling out its contractual rights. In the absence of this, a bank may find that general clauses contemplating an 'on demand' discretionary right to recall an 'overdraft' facility might be viewed as inconsistent with or repugnant to the express purpose of the facility. In short the express term that the overdraft facility is repayable on demand will usually be given effect to altogether this is not agreement the parties have reached on the express purpose and/or duration of the facility … '.

[49] Be that as it may, from the pleaded case of the parties this is not an issue for determination. The only issues in this case are those we discussed. For this we find no necessity to deal with it as it is irrelevant.

CONCLUSION

[50] For reasons aforesaid, we answer the first question in the negative and for the second question there is no necessity for an answer. Accordingly, we would allow this appeal with costs here and below. We direct that the judgment of the Court of Appeal be set aside and the orders of the trial judge reinstated.

Appeal allowed with costs here and below.

Reported by Kohila Nesan